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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 290

ONE, INCORPORATED, A CORPORATION, PETITIONER

v.

OTTO K. OLESEN, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of California, Central Division (R. 31–34), are not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 47–57) is reported at 241 F. 2d 772.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957 (R. 47). A petition for rehearing, timely filed, was denied on April 12, 1957 (R. 59). On June 10, 1957, the time within which

to file a petition for a writ of certiorari was extended by Mr. Justice Douglas to July 26, 1957. The petition for a writ of certiorari was filed on July 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the October 1954 issue of "One, The Homosexual Magazine," is obscene and therefore nonmailable under 18 U. S. C. 1461.

STATUTE INVOLVED

18 U. S. C. 1461 provides in pertinent part as follows:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; * * *
>
> * * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> * * * * * *

STATEMENT

In October 1954, petitioner delivered for mailing approximately 600 copies of the October 1954 issue of "One" to the United States Post Office at Los Angeles, California (R. 3, 37). Respondent, Postmaster of Los Angeles, refused to dispatch these magazines through the mails and notified petitioner that this action was taken because the magazines were nonmailable under 18 U. S. C. 1461 (R. 37). Subsequently, these copies of "One" were returned to petitioner (R. 37).

On September 16, 1955, petitioner filed its complaint in the District Court for the Southern District of California seeking to enjoin the postmaster from continuing to refuse to accept for mailing the October 1954 issue of "One" (R. 2–5). After an answer was filed on behalf of respondent, the case came on for trial setting (R. 38). The parties then stipulated that the only question involved was whether this particular issue of "One" was nonmailable under 18 U. S. C. 1461, *supra* (R. 38). Upon consideration of the pleadings and motions and affidavits filed by the parties, the District Court resolved the stipulated issue in respondent's favor (R. 31–35).

On appeal, the court below reexamined the issue which had been stipulated as the only one in the case, and affirmed the judgment of the District Court (241 F. 2d 772, R. 47–57). It discussed *in extenso* the material found by the District Court to be obscene (241 F. 2d at 777–8, R. 54–55) and, on the basis of this examination, held: "It is apparent that the magazine is obscene and filthy and therefore nonmailable matter" (241 F. 2d at 777, R. 53). A petition for rehearing was denied (R. 59).

ARGUMENT

The sole issue raised by this case, stipulated by the parties in the District Court, is whether the October 1954 issue of "One" is nonmailable under 18 U. S. C. 1461, *supra*, p. 2. No question of procedure is raised, and no issue of constitutionality. The single question before the Court is essentially one of fact and was decided adversely to petitioner

in both courts below. In reaching their conclusions, these courts utilized the legal standards recently reaffirmed by this Court in *Roth* v. *United States*, No. 582, Oct. T., 1956.

The terms of statutes, such as 18 U. S. C. 1461, which seek to define and reach obscene and filthy matter have been recognized as necessarily lacking precision. *Roth* v. *United States, supra,* slip op., p. 13. Such statutes do not, however, fail for this reason. The inquiry to be made is not solved by the application of a mathematical formula or by the use of a slide rule. *Roth* v. *United States, supra,* slip op., pp. 13–14; *United States* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2). On the contrary, the trier of fact must determine "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth* v. *United States, supra,* slip op., p. 11.

The method of decision employed by the court below in this case fully satisfies the "dominant theme" test reaffirmed in *Roth*. The court specifically recognized the need to consider the magazine as a whole so as to determine its basic or primary purpose (241 F. 2d at 778, R. 55–56), and it did so. It entered upon the same inquiry as that made by the district judge, examining in detail certain stories, a poem, an advertisement, and the material thus advertised (R. 33; 241 F. 2d at 777–8, R. 53–55). The court thereupon concluded (241 F. 2d at 778, R. 56):

> * * * The magazine under consideration, by reason of the articles referred to, has a pri-

mary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraving and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy.

There is no need for this Court to review these findings.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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AUGUST 1957.

[1] The courts below did not find the magazine non-mailable simply because it deals with the subject of homosexuality. As the Court of Appeals noted (241 F. 2d at 777, R. 53), the publisher opens the magazine with the statement that it proposes to deal "with homosexuality from the scientific, historical and critical point of view", but the actual contents of the issue do not bear out that pronouncement. On the contrary, the material in the magazine appears primarily to deal with sex—openly and covertly, by drawings and words—"in a manner appealing to [the] prurient interest" of those the magazine tries to reach. *Roth* v. *United States*, *supra*, slip op., p. 9. The emphasis is, in the main, not on the philosophical, scientific, or educational.

U. S. GOVERNMENT PRINTING OFFICE: 1957